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No. 87-1412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUSAN E. DAVIDSON,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS

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QUESTION PRESENTED

Whether a substantial federal question has been presented where in her prior appeal this Court rejected appellant's claim that her double jeopardy rights were violated when a mistrial was declared allowing the State to pursue an appeal from the erroneous grant of a motion to suppress significant State's evidence which should have been filed before jeopardy attached?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
MOTION TO DISMISS: –	
THIS COURT HAS ALREADY CORRECTLY RULED APPELLANT'S DOUBLE JEOPARDY CLAIM TO BE MERITLESS	1
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	PAGE
Arizona v. Washington, 434 U.S. 497 (1978)	6, 7
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	2
Downum v. United States, 372 U.S. 735 (1963) ...	6, 7
Mandel v. Bradley, 432 U.S. 173 (1977)	2
Ohio v. Johnson, 467 U.S. 493 (1984)	6
People v. Davidson, 116 Ill. App. 3d 164, 451 N.E. 2d 978 (5th Dist. 1983)	4
People v. Flatt, 82 Ill.2d 250, 412 N.E.2d 509 (1980)	4, 5
Ricketts v. Adamson, ___ U.S. ___, 107 S.Ct. 2680 (1987)	6
United States v. Dinitz, 424 U.S. 600 (1976)	5
United States v. Mara, 410 U.S. 19 (1973)	4
United States v. Moon, 491 F.2d 1047 (5th Cir. 1974)	5
United States v. Scott, 437 U.S. 82 (1978)	5, 6
Wade v. Hunter, 336 U.S. 684 (1949)	6, 7

Statutes	
Ill. Rev. Stat. 1981, ch. 110A, para. 604	2, 4
28 U.S.C. § 1257	2

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MOTION TO DISMISS

The appellee, the People of the State of Illinois, move pursuant to Supreme Court Rule 16.1(b) that this Court dismiss the appeal of appellant Susan E. Davidson. They so move because this Court has already correctly ruled that appellant's double jeopardy claim does not present a substantial federal question. In support of this motion, appellee submits the following Argument.

THIS COURT HAS ALREADY CORRECTLY RULED APPELLANT'S DOUBLE JEOPARDY CLAIM TO BE MERITLESS

Among the numerous and lengthy legal proceedings conducted in this case was appellant's pre-trial motion to dismiss her prosecution, which unsuccessfully attacked the

constitutionality of Illinois Supreme Court Rule 604(a)(1), Ill. Rev. Stat. 1981, ch. 110A, para. 604, on double jeopardy grounds. (Appellant's Jurisdictional Statement, Appendix, A. 14-17) Appellant's pre-trial appeal to the Appellate Court of Illinois, purportedly filed pursuant to Rule 604(f), was dismissed as "clearly frivolous and without merit" (A. 18-20), her Petition for Leave to Appeal to the Illinois Supreme Court was denied (A. 21), and her appeal to this Court (No. 84-137) was dismissed on October 1, 1984, "for want of a substantial question." (A. 36)

This Court's "[s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction, and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Appellant's Jurisdictional Statement filed in Case No. 84-137 argued that a determination of the constitutionality of Rule 604(a)(1) fell within this Court's obligatory jurisdiction under 28 U.S.C. § 1257(2) and posed the precise Question Presented now set forth. Accordingly, this Court has already determined appellant's claim to be meritless.

Despite this Court's prior litigation of the issue, appellee will briefly respond to those arguments raised by the Jurisdictional Statement. To the extent that appellant suggests that Rule 604(a)(1) could be applied unconstitutionally in other contexts, she clearly has no standing. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on a ground that it may conceivably be un-

constitutionally applied to others, in other situations not before the Court.") And perusal of the following facts underlying the case at bar establishes that appellant herself has suffered no harm prohibited by the Double Jeopardy Clause.

Appellant was convicted of murder by accountability, arising from the October 31, 1979 shooting of her husband by her boyfriend William Gill. The prosecutor's case centered upon a group of handwritten letters wherein the murder was planned. (R. 1270, 1305, 1406, 1471) These letters did not become accessible to the State until after Gill's trial, which ended in a conviction of voluntary manslaughter but an acquittal of murder. (C. 42, 520) In order to establish appellant's authorship of the letters, the State sought and was granted a court order that she execute handwriting exemplars in her attorney's presence. (C. 84; R. 1112-20) The exemplars were executed and then submitted for expert analysis by the questioned documents examiner, who determined appellant to be the author of the letters. (C. 275; R. 1492-1502, 1541-50) The expert's report was promptly forwarded to defense counsel. (C. 275)

After extensive pretrial hearings on appellant's suppression and dismissal motions held in March of 1981 (R. 468 *et seq.*), the case was finally set for jury trial February 8, 1982. The prosecutor emphasized the significance of the exemplars during his opening statement and sought admission of the exemplars in conjunction with the testimony of a police officer who supervised their execution. (R. 1541-51) Despite having known for months of the State's intent to rely on the exemplars, appellant for the first time objected to their admission on the ground that their compelled execution violated her fifth amendment privilege against self-incrimination. (R. 1552-53, 1557, 1561,

1569, 1581) In a patently erroneous ruling on its merits [*see, e.g., United States v. Mara*, 410 U.S. 19 (1973)], the trial court agreed. (R. 1574-76)

The prosecutor reminded the court that under the current circumstances, exclusion of the foundational exemplars was tantamount to exclusion of the critical letters themselves. Accordingly, unless appellant was willing to stipulate to the authorship of the letters or to agree to a continuance in order that additional exemplars could be executed and analyzed, the prosecution would be required to initiate an interlocutory appeal pursuant to Rule 604 (a)(1) as construed by the Illinois Supreme Court in *People v. Flatt*, 82 Ill.2d 250, 412 N.E.2d 509 (1980). (R. 1564, 1587-88, 1646-48) After appellant refused to either stipulate to authorship or to a brief continuance, the State sought and was granted a statutory mistrial in order that it could pursue an appeal of the trial court's suppression order. (R. 1564, 1648-58)

On appeal to the Appellate Court of Illinois, Fifth Judicial District, the court held in accord with *Flatt* that (1) the trial court is not authorized to entertain a mid-trial defense motion to suppress evidence on grounds collateral to guilt or innocence when the motion could have been made before the attachment of jeopardy and (2) both the Double Jeopardy Clause and Rule 604(a)(1) permit a State appeal from an unauthorized suppression order where the prosecutor certifies that it substantially impairs his ability to prosecute the case. Because appellant's motion to suppress the exemplars relied upon constitutional protections operating independent of their evidentiary value, it should have been made before trial and not entertained after jeopardy had attached. *People v. Davidson*, 116 Ill. App. 3d 164, 451 N.E.2d 978 (5th Dist. 1983). (A. 1-12)

Appellant's double jeopardy claim appears to be premised on the assumption that because she leveled a verbal objection to the State's mid-trial appeal, manifest necessity for the resulting statutory mistrial must be established.[1] Despite her objection, however, appellant here must be deemed to have consented to the course of proceedings followed. Appellant pressed a mid-trial motion which the state courts had, at least since the *Flatt* decision, reasonably required to be filed before jeopardy attached when the State's right to appeal the ruling is undisputed.[2] Even assuming the timing of the suppression request was not tactically motivated, a point on which appellant has not taken a position, she refused to concur in alternative courses of action proposed by the State which would alleviate the prejudice it had suffered by virtue of her tardy complaint to the judge. And appellant's refusal occurred with full knowledge that the State would thereafter obtain a reversal and remand pursuant to *Flatt* should the appellate court find the suppression order unauthorized. Appellant, no less than the defendant in *United States v. Dinitz*, 424 U.S. 600, 609 (1976), "retain[ed] primary control over the course to be followed

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[1] Because the grant of appellant's motion was based on grounds collateral to guilt or innocence, it did not constitute an acquittal to which "the law attaches particular significance." *United States v. Scott*, 437 U.S. 82, 91, 97 (1978). Indeed, because mistrial declarations "all but invariably contemplate[ ] that the prosecutor will be able to proceed anew notwithstanding the defendant's plea of double jeopardy" (*id.* at 92), no subjective expectations of finality in the order here are implicated.

[2] Appellant's representation that she alone has suffered invocation of the procedural requirement to partially justify a mistrial in Illinois (J.S. at 14) is incredible in light of her failure to even attempt distinguishing *Flatt* as controlling authority. Nor is the result "an eccentricity". (J.S. at 11) *See, e.g., United States v. Moon*, 491 F.2d 1047 (5th Cir. 1974).

in the event of [ ] error"; no less than the defendants in *United States v. Scott*, 437 U.S. 82, 99 (1978), and *Ricketts v. Adamson*, ____ U.S. ____, 107 S.Ct. 2680, 2686 (1987), appellant should not be relieved "from the consequences of [her] voluntary choice."

Even assuming appellant here did not effectively consent to the mistrial, this Court's decision in *Arizona v. Washington*, 434 U.S. 497, 513 (1978), suggests that error attributable to a defendant is nonetheless to be considered in assessing whether the mistrial is manifestly necessary. *Cf. Downum v. United States*, 372 U.S. 735 (1963) (where government erred in allowing jury to be sworn without ascertaining whether previously unlocated witnesses had been found). Appellant's improper conduct is particularly significant here inasmuch as not only was her motion to suppress untimely, causing an interruption of the trial to resolve an issue unrelated to her guilt or innocence which the prosecutor's opening statement to the jury had assumed to be settled, but the State was thereby deprived of its specifically authorized pre-trial right to appeal the merits of a patently erroneous suppression order.

More importantly, had the trial court's suppression order remained intact, through no fault of its own the State would have been denied "its right to one full and fair opportunity to convict those who have violated its laws." *Ohio v. Johnson*, 467 U.S. 493, 104 S.Ct. 2536, 2542 (1984). Certainly if the existence of possible juror bias can support a finding of manifest necessity as in *Washington*, so can the improper suppression of significant State's evidence. However, relying on *Washington*, *Downum* and *Wade v. Hunter*, 336 U.S. 684 (1949), appellant suggests that a prosecutor's certification of necessity under Rule 604 cannot operate as a substitute for the trial court's

determination thereof. (J.S. at 13) *See generally id.* at 689 ("When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination.").

In *Washington*, this Court reasoned that the trial court is in the best position to ascertain the effect of defense error on juror bias. *See also Wade, supra* (where court-martial, after hearing all evidence and argument, ruled that additional evidence need be presented before it could resolve the case); *Downum, supra* (where issue to be determined was prosecutor's diligence before allowing jury to be impaneled). In contrast, it is the prosecutor who maintains a superior position in determining what impact the exclusion of evidence will have on the objective strength of the State's case-in-chief which has not yet been presented in its entirety. Moreover, the propriety of the prosecutor's evaluation may be readily assessed in this Court through perusal of the State's evidence eventually adduced. *See Washington*, 434 U.S. at 510, n.28 (manifest necessity may be determined through close appellate scrutiny though trial court failed to exercise its sound discretion in declaring mistrial). Appellant herself conceded below that the letters were significant to the State's case, yet she objected to all alternative methods suggested by the prosecutor pursuant to which a foundation for their introduction could be laid. Without the admission of the letters at appellant's trial, she may well have been unjustifiably acquitted of murder as was her accomplice William Gill.

CONCLUSION

Wherefore, the appellee, the People of the State of Illinois, respectfully moves that the appeal be dismissed because it raises no substantial federal question worthy of review by this Court.

Respectfully submitted,

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